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No.

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM 1986

LAW ENFORCEMENT INSURANCE COMPANY, LTD.,
A BERMUDA CORPORATION

Petitioner,

v.

JAMES P. CORCORAN, SUPERINTENDENT OF INSURANCE OF THE STATE OF NEW YORK AS LIQUIDATOR OF IDEAL MUTUAL INSURANCE COMPANY, IN LIQUIDATION,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTIONS PRESENTED

I. WHETHER THIS COURT SHOULD REVIEW THIS CASE IN ORDER TO RESOLVE THE EXTREME CONFUSION EVIDENCED BY CONFLICTING OPINIONS BY THREE FEDERAL COURTS CONCERNING THE APPLICATION OF THE ABSTENTION DOCTRINE IN THE CONTEXT OF STATE INSURANCE LIQUIDATION PROCEEDINGS.

II. WHETHER THE CIRCUIT COURT ERRED IN FAILING TO ADDRESS THE CRITERION ESTABLISHED BY THIS COURT IN *BUFORD* V. *SUN OIL COMPANY* FOR INVOKING THE ABSTENTION DOCTRINE.

III. WHETHER THE COURT BELOW IGNORED ESTABLISHED PRINCIPLES OF JUDICIAL ECONOMY AND ABROGATED ITS STATUTORY DUTY TO ASSERT JURISDICTION OVER PARTIES PROPERLY BEFORE IT.

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* Pursuant to Supreme Court Rules 21.1(b) and 28.1, the following were parties to the proceedings below:
Law Enforcement Insurance Company, Ltd.
James P. Corcoran
The Law Enforcement Insurance Company, Ltd. has no parent company or subsidiaries.

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OCTOBER TERM 1986

LAW ENFORCEMENT INSURANCE COMPANY, LTD.,
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Petitioner,

v.

James P. Corcoran, Superintendent of Insurance of the State of New York as Liquidator of Ideal Mutual Insurance Company, in Liquidation,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

OPINIONS BELOW

The opinion of the United States Court of Appeal for the Second Circuit is reported in Federal Reporter, Second Series at 807 F.2d 38. The opinion of the District Court is reported at 640 F. Supp. 271. These opinions are set forth in their entirety in the Appendix at 1a and 1b respectively.

JURISDICTIONAL STATEMENT

The opinion of the Second Circuit was issued on December 12, 1986. A copy of that opinion is set forth in its entirety in the Appendix at 1a.

Jurisdiction over this matter is conferred upon this Court by 28 U.S.C., Section 1254(1).

STATUTORY PROVISIONS INVOLVED

28 U.S.C., Section 1332. Diversity of citizenship.

(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and is between—

(1) Citizens of different States;

(2) citizens of a State and citizens or subjects of a foreign state;

(3) citizens of different States and in which citizens or subjects of a foreign state are additional parties; and

(4) a foreign state, defined in section 1603(a) of this title [28 USCS, Section 1603(a)], as plaintiff and citizens of a State or of different States.

28 U.S.C., Section 2201, Creation of Remedy, Declaratory Judgments.

In a case of actual controversy within its jurisdiction, except with respect to Federal taxes other than actions brought under section 7428 of the Internal Revenue Code of 1954 [26 USCS, Section 7428], any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

STATEMENT OF THE CASE

Preliminary Statement

On July 21, 1986, the United States District Court for the Southern District of New York, by the Honorable Pierre N. Leval, dismissed, on the grounds of abstention, appellant's action

for declaratory judgment brought pursuant to 28 U.S.C., Section 2201.

Plaintiff-appellant, Law Enforcement Insurance Company, Ltd. ("LEICL"), a Bermuda insurance company, invoking the diversity jurisdiction of the federal court, 28 U.S.C., Section 1332, sought a declaration of the rights and obligations of the parties under a contract that LEICL had entered into with Ideal Mutual Insurance Company ("Ideal"), a New York insurance company, in 1983. Specifically, LEICL sought a declaration that under the 1983 Agreement, Ideal assumed LEICL's direct insurance obligation to insureds and its duty to defend on policies issued by LEICL in 1977. In 1985, Ideal went into liquidation pursuant to the insurance laws of the State of New York. The District Court held that abstention was appropriate under this Court's decision in *Colorado River Conservation District* v. *United States*, 424 U.S. 800, *rehearing denied*, 426 U.S. 919 (1976). The Court found that maintenance of the action in federal court would interfere with New York's established policies and scheme for the liquidation of insolvent insurance companies.

The United States Court of Appeals for the Second Circuit affirmed the dismissal but rejected the District Court's holding that *Colorado River* abstention was appropriate. The Circuit Court ruled instead that abstention was applicable under this Court's decision in *Burford* v. *Sun Oil Company*, 319 U.S. 315 (1943).

Statement of Facts

In response to the increasing number of civil rights damage actions brought against law enforcement personnel across the country, plaintiff-appellant, LEICL was established in Bermuda in 1977 to provide group professional liability insurance coverage for members of the National Sheriff's Association, a nationwide association of local sheriffs, marshals, police officers, and other law enforcement personnel. In 1977, the first year of this insurance program, LEICL issued liability insurance policies in its own name and was directly liable to its insureds for losses covered by the policies. LEICL was also obligated to defend any claims

against its insureds covered by the policies. LEICL also reinsured a portion of its insurance obligation with other companies.

In 1978, LEICL entered into an agreement with Ideal, a New York insurance company, under which Ideal agreed to become the "front" insurance company for the program, meaning Ideal would issue policies in its name, with the understanding that LEICL would reinsure or obtain reinsurance for a significant portion of Ideal's direct insurance obligation to the insureds.

In December 1983, LEICL and Ideal entered into certain agreements (hereinafter the "1983 Agreements"), under which Ideal agreed to assume *all* the insurance obligations incurred by LEICL on *all* the policies issued during the program, including LEICL's reinsurance obligations on the post-1977 Ideal policies and, LEICL maintains, LEICL's direct insurance obligations on the policies issued by LEICL in 1977. As consideration for this transfer of its insurance obligations to Ideal, LEICL paid Ideal substantially all of LEICL's liquid assets, amounting to $2,895,669.31.

In February 1985, Ideal was placed in liquidation, and the Superintendent of Insurance of the New York State Department of Insurance was appointed Liquidator.[1]

On October 4, 1985, the Liquidator, writing on behalf of Ideal, notified LEICL that Ideal would not honor claims or indemnification demands on the 1977 policies and maintained that under the 1983 Agreements Ideal "never assumed a direct

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[1] The Court order provided:

ORDERED AND ADJUDGED, that the officers, directors, trustees, policyholders, agents and employees of IDEAL, and all other persons, including but not limited to claimants, plaintiffs and petitioners who have claims against IDEAL, are permanently enjoined and restrained from bringing or further prosecuting any action at law, suit in equity, special or other proceeding against the said corporation or its estate, or the Superintendent and his successors in office, as Liquidator thereof, or from making or executing any levy upon the property or estate of said corporation, or from in any way interfering with the Superintendent, or any successor in office, in his possession, or in the discharge of his duties as Liquidator thereof, or in the liquidation of the business of said corporation . . .

obligation to pay or indemnify any insured of LEICL [on the 1977 policies]."

That brief letter constitutes the sole and final determination of the Liquidator respecting Ideal's obligation on the 1977 policies. The Superintendent's ruling was not based on any factual or legal inquiry that LEICL is aware of respecting the formation, intent, legality or effect of the 1983 Agreements as they affect the 1977 policies. The consequence of the Superintendent's refusal to honor Ideal's direct insurance obligations on the 1977 claims is that those insureds with unsettled 1977 claims cannot recover on claims in the Ideal insolvency proceeding and will not be protected by the various state guaranty funds on claims against Ideal, an insolvent insurance company.

Faced with the Superintendent's determination, LEICL brought an action for a declaratory judgment in federal court invoking diversity of citizenship as the basis for jurisdiction. In that action, LEICL sought a declaration as to whether under the 1983 Agreements, Ideal agreed to become the direct insurer on the 1977 policies. The Liquidator moved to dismiss the action on the basis of the court's discretion under the Declaratory Judgment Act and the abstention doctrines articulated by this Court in *Colorado River Conservation Water District* v. *United States*, 424 U.S. 800 (1976), *reh. den.* 426 U.S. 919 (1976), and *Burford* v. *Sun Oil Co.*, 319 U.S. 315 (1943), *reh. den.*, 320 U.S. 214 (1976). The District Court granted the motion though limited the grounds for its decision to the *Colorado River* abstention doctrine.

The Second Circuit entirely rejected the District Court's analysis stating that abstention was not appropriate under *Colorado River*. The Court affirmed on the ground that abstention was proper under *Burford*.

ARGUMENT

I. THIS COURT SHOULD REVIEW THIS CASE IN ORDER TO RESOLVE THE CONFLICTING OPINIONS BY THREE FEDERAL COURTS CONCERNING THE APPLICATION OF THE ABSTENTION DOCTRINE IN THE CONTEXT OF INSURANCE LIQUIDATIONS.

Petitioner urges this Court to grant the petition for certiorari in order to guide the lower courts on the unresolved issues of Federal law presented herein. The confusion concerning the application of the abstention doctrine in the context of insurance liquidations by state agencies is clearly evidenced by the history of this litigation and by the conflict between the Second and Sixth Circuits.

In this case, the district court held that abstention was proper under *Colorado River*. The Circuit Court panel disagreed, holding that *Colorado River* abstention was improper, but that *Burford* abstention applied.

A third Federal court has reached a totally different result. In *McDonough Caperton Shepard Group, Inc.* v. *Academy of Medicine, et al*, No. 85-3507 (N.D. Ohio August, 13, 1986) (a copy of this opinion appears in the Appendix beginning at 1c), the United States District Court for the Northern District of Ohio ruled that neither *Colorado River* nor *Burford* supported the application of the abstention doctrine in the context of liquidation of an insurance company. In a case involving the same party involved herein (the Estate of Ideal Mutual), the Court retained jurisdiction in an interpleader action to determine ownership of funds held for the benefit of the former insureds of Ideal Mutual. Defendants appealed and the abstention issue is currently pending before the Sixth Circuit.

The issues presented in this case are of national significance. A substantial number of insurance liquidation proceedings have been instituted in various states in recent years. The lower federal and state courts need definitive guidance concerning the role of

the federal courts in protecting the rights of claimants involved in liquidation proceedings. This Court should grant the Petition for Certiorari in order to resolve the confusion and inconsistent results which are manifested by these decisions.

II. THE CIRCUIT COURT BELOW FAILED TO APPLY THE CRITERION ESTABLISHED BY THIS COURT IN *BURFORD* v. *SUN OIL COMPANY* FOR INVOKING THE ABSTENTION DOCTRINE.

The Circuit held that abstention was proper under this Court's ruling in *Burford*. The Circuit Court's cursory analysis misstates the holding of this Court in *Burford* and fails to address the narrow prerequisites outlined in that case for applying the doctrine of abstention.

In determining that abstention was proper, the Circuit Court ignored established principles of judicial economy by directing that the district court should exercise jurisdiction in the event the state proceedings prove "inadequate." Appendix A at 8a, n.5; 10a, n.8. This unprecedented procedure raises the probability of duplicative proceedings which will further strain our court systems, both state and federal. See Argument III, *infra*.

Petitioner, a Bermuda insurance company has invoked the Delaratory Judgment Act in an effort to determine whether the New York company to which it paid virtually all of its assets is obligated to pay directly, the claims of its insureds.

In invoking diversity jurisdiction, Petitioner follows a well worn path of foreign persons and corporations who have sought relief in our Federal Courts which were historically expanded to provide a neutral forum free from local interests. In the instant case, Petitioner is aligned against the New York Superintendent of Insurance who is liquidating a New York insurance company under authority of a New York statute, implemented by an order of the New York Supreme Court. A clearer case for invoking federal diversity jurisdiction to insulate the cause from local interests cannot be imagined.

The opinion of the Second Circuit is defective in failing to identify any genuine conflict between the federal declaratory judgment action and the unified state scheme for distributing the assets of the estate of the liquidated company. In the three pages of its opinion devoted to *Burford* (Appendix beginning at 9a), the court speaks extensively concerning the existence of a complex administrative scheme. Nowhere in the opinion does the court state, suggest, imply or even discuss a conflict between the Federal declaratory judgment action and the administrative scheme.

Petitioner submits that the Second Circuit's discussion contains no conflict because none exists. The declaratory relief sought in District Court does not impair the state scheme in any way. On the contrary, the federal action *compliments* and *facilitates* the administrative proceedings. Because of the absence of a genuine conflict, abstention is improper.

In *Burford* v. *Sun Oil Co., supra*, the plaintiff challenged a regulation of the Texas Railroad Commission defining minimum distances between oil wells. This Court held that abstention was justified where there existed a genuine conflict between the federal court and a unified state administrative and judicial system to resolve complex issues of law and fact. With respect to the statutory scheme in *Burford*, the Court found: (1) the placement of oil wells involved complex determinations of fact as to the geological structure of the state; (2) the issue of minimum spacing between oil wells implicated the state's conservation program and with it the economy of the state; (3) the legislature of Texas concentrated decision making in the Texas Railroad Commission and a single court (the state district court of a particular county), thereby effecting a unified administrative and judicial scheme; and (4) the federal courts had created considerable difficulties for the Governor of Texas, the Texas legislature, and the Railroad Commission. *Id.* at 323-325.

In *Alabama Public Service Commission* v. *Southern Railway Co.*, 341 U.S. 341 (1951), the Court reaffirmed its analysis in *Burford*. As in *Burford*, the regulatory apparatus was centralized

by concentrating decision making in the Public Service Commission, with review in a single circuit court. *Id.* at 349-50. This Court again found a history of detrimental intervention by the federal courts.

This Court's decisions in *Burford* and *Alabama Public Service Commission* were summarized in *Colorado River, supra*:

> Abstention is also appropriate where there have been presented difficult questions of state law bearing on policy problems of substantial public import whose importance transcends the result in the case then at bar . . . In *Burford* v. *Sun Oil Co.*, . . . for example, the Court held that a suit seeking review of the reasonableness under Texas state law of a state commission's permit to drill oil wells should have been dismissed by the District Court. The reasonableness of the permit in that case was not of transcendent importance, but review of reasonableness by the federal courts in that and future cases, where the State had established its own elaborate review system for dealing with the geological complexities of oil and gas fields, would have had an impermissibly disruptive effect on state policy for the management of those fields.

Colorado River, supra, at 814-15

In all three cases, this Court focused upon the disruptive conflict inherent in the assertion of federal jurisdiction and *Burford* and its progency thus dictate that abstention is justified only upon a finding of the following elements: (1) the issue raised in federal court must be the subject of a comprehensive and unified administrative and judicial scheme and must be of such a nature that the determination of the issue requires a specialized expertise on the part of the administrative and judicial fora; (2) the issue must be of substantial public concern, transcending the interests of the litigants; and (3) the exercise of federal jurisdiction would so conflict with the administrative and judicial apparatus as to undermine the public interest involved.

A. The Circuit Court Totally Fails to Identify any Genuine Conflict Between the Federal Declaratory Judgment Action and the State Administrative Scheme.

Even assuming that a unified judicial and administrative scheme existed, *Burford* abstention would remain nonetheless inappropriate. It is settled law that federal district courts are obligated to exercise jurisdiction over actions against insolvent insurance companies for declaratory judgments as to the legal validity of claims. *Penn Central Casualty Co.* v. *Pennsylvania*, 294 U.S. 189, 194-195 (1935); *Dempsey* v. *Pink*, 92 F.2d 572, 572-73 (2nd Cir. 1937) (A. Hand, J.), *cert. denied*, 303 U.S. 648 (1938); *McDonough Caperton Shepard Group, Inc.* v. *Academy of Medicine, Cleveland*, No. 85-3507 (N.D. Ohio August 13, 1986) (a copy of this opinion appears in the Appendix beginning at 1c); *Slotkin* v. *Brookdale Hospital Center*, 357 F. Supp. 705, 707-708 (S.D.N.Y. 1972). *See also Dixon* v. *Cleveland*, 31. F. Supp. 1010, 1013 (D.S.C. 1940). These decisions expressly reject the argument that the federal courts, as a prudential matter, should defer to related and ongoing liquidation proceedings in state court.

The theoretical grounds for these cases is the elemental observation that the issue of federal court deference to state courts and vice versa only arises when there is a true conflict between the two proceedings and that there is no such conflict when one proceeding is for a declaratory judgment as to the rights of prospective claimants and the other for the physical distribution of assets in light of those rights. Such proceedings are in their essence *complementary*:

> [W]here the state court has control of the administration of . . . [an] estate, an action *in personam* may be instituted in the federal court . . . to establish the validity and amount of a claim against the estate, since the federal court's action in no way interferes with the state court's control of the *res*. 1A Moore's Federal Practice, 2607 (2d ed. 1965).

In *Dempsey, supra*, the plaintiff brought suit in federal district court against the New York Superintendent of Insurance, who was overseeing the liquidation of a surety company pursuant to New York State Insurance Law. The court, per Augustus Hand, held that there was no interference with the state court proceeding: the subject of the state liquidation proceeding was the distribution of the property of the insolvent insurance company amongst those who had valid claims; the subject of the federal proceeding, on the other hand, was whether the plaintiff possessed such a claim.

The intellectual genesis of *Dempsey, supra*, is found in *Penn General Casualty Company* v. *Pennsylvania, supra*. In *Penn General*, this Court faced the question of whether a state court must defer to a prior and pending federal proceeding involving the assets of an insolvent insurance company. This Court held that it need not.

> Where the judgment sought is strictly in personam, for the recovery of money or for an injunction compelling or restraining action by the defendant, both a state court and a federal court having concurrent jurisdiction may proceed with the liquidation, at least until judgment is obtained in one court which may be set up as res judicata in the other. *See Buck* v. *Colbath*, 70 U.S. 334, page 342 of 3 Wall. (1866); *Kline* v. *Burke Construction Co.*, 160 U.S. 226, and cases cited at pages 230, 231 (1922).

Penn General, supra at 195. *Penn General* and its progeny dictate the outcome of the instant case. LEICL's action for declaratory relief creates no direct conflict with the pending state liquidation proceedings: therefore, no justification exists for invoking abstention.

The holdings of *Penn General* and *Dempsey* were reaffirmed in *Slotkin* v. *Brookdale Hospital Center, supra*.

The court, citing the precedents beginning with *Penn General*, rejected abstention:

> . . . two actions may proceed simultaneously where one is *in rem* and the other is *in personam* . . . . Here Plaintiffs seek to establish [the insurance company's] *in personam* liability for its allegedly fraudulent acts. This cause of action, to decide a claim against funds being administered by the state court, in no way interferes with the State's custody or control of the *res*. *Id*. at 707-708.

The facts and holdings of this decision are precisely on point with the case before this Court. The plaintiff in the instant case has brought an *in personam* action for declaratory relief that in no manner interferes with the state's distribution of the corporate assets.

Another case raising the identical legal issues now before this Court and involving the same defendant was recently resolved against abstention. *McDonough Caperton Shepard Group, Inc.* v. *Academy of Medicine, supra*. In that case, the plaintiff, McDonough Caperton Shepard Group, Inc. ("MCSG"), was an insurance broker that sold insurance plans from Ideal to third parties. The third parties, in turn, paid MCSG approximately $1.6 million in premiums. MCSG filed an interpleader action in federal court, placing the $1.6 million into the registry of the Court. Ideal, MCSG and each of the third parties made claims to the assets. Ideal moved to dismiss the action on the grounds of abstention and the McCarran-Ferguson Act. As to the former, Ideal maintained that the abstention doctrines enunciated in *Colorado River, supra*, and *Burford, supra*, precluded the court from exercising jurisdiction. The Court held that neither doctrine compelled abstention:

> This case, the *Burford* and *Colorado River* cases, and the other cases which the New York defendants cite are distinct. *See* n.3, *supra*. Here, the issues are not those before the New York court. In *Burford*, the plaintiffs sought to enjoin an order of a state agency. 319 U.S. at 317, 63 S.Ct. at 1099. In *Colorado River*, the federal district court and a state court had the same questions

> of law and fact before them. 424 U.S. at 807, 96 S.Ct. at 1240. Similarly, direct intervention in state proceedings was the basis of each of the other cases which the New York defendants cite. [citation omitted].
>
> This case involves money abiding in the registry of the court; the action in the New York court involves the property of a liquidated insurance company. While both are *in rem* actions; the *res* of each is distinct. This case does not involve the direct interference in ongoing state proceedings that give rise to the *Burford* doctrine; and that doctrine does not apply.
>
> This case involves issues distinct from those before the New York court. Here, the issue is what are the respective rights of these parties to the money in the court's registry. *To the extent the claims of the New York defendants, if any, are meritorious, some, none, or all of the money will be adjudicated part of the res, before the New York court.* There, the issue of what are the priorities of Ideal's creditors will be resolved. Thus, there will be one resolution of each issue and the doctrine of *Colorado River* does not apply.

McDonough, supra (Appendix at 5c-6c) (emphasis added). This analysis is of equal force if not greater force with respect to the present case in which there is an *in personam* action in federal court and *in rem* action in state court. The opinions below do not address the important lack of conflict between *in personam* and *in rem* actions in this context which are inherently complementary.

The authorities cited clearly demonstrate that a careful analysis of the potential conflict between federal and state proceedings is required prior to the imposition of the abstention doctrine. The Second Circuit's opinion is totally lacking in any such analysis.

As reviewed above, plaintiff has alleged that under the contract entered into between LEICL and Ideal, Ideal assumed

responsibility for policies issued in 1977. The defendant maintains that Ideal did not assume these obligations. This dispute involving basic common law contract principles is hardly one which has a significance extending beyond the interests of the two parties and the insureds covered by the 1977 policies. The Declaratory Judgment action does not even involve substantial issues of state policy, let alone disrupt or conflict with them.

B. The Insurance Liquidation In This Case Does Not Involve a Unified Administrative and Judicial Scheme.

The second reason for rejecting the use of *Burford* abstention in this case is that there exists no unified administrative and judicial scheme for resolving the issues raised by LEICL. In *Burford*, all cases arising under the particular statute were heard in a single, specialized court as required by the statute that set up the scheme. Unlike *Burford*, there is no special court which deals exclusively with issues raised in a challenge to the Liquidator's declaration as to the contractual rights under insurance contracts as opposed to the Liquidator's traditional function of developing and recommending to the court a scheme of payments. Legal review of the former decisions may be had in a separate, entirely independent suit before a different Supreme Court Justice than that which issued the original order of insolvency.

C. The Federal Declaratory Judgment Action Does Not Involve Substantial Issues of State Policy.

Defendant has failed to demonstrate that substantial issues of public policy are implicated in the present case. Absent this, the federal courts are required to assert jurisdiction.

As reviewed above, plaintiff has alleged that under the contract entered into between LEICL and Ideal, Ideal assumed responsibility for policies issued in 1977. The defendant maintains that Ideal did not assume these obligations. This dispute involving basic common law contract principles is hardly one which has a significance extending beyond the interests of the two parties and the insureds covered by the 1977 policies.

III. THE COURT BELOW IGNORED ESTABLISHED PRINCIPLES OF JUDICIAL ECONOMY AND ABROGATED ITS STATUTORY DUTY TO ASSERT JURISDICTION OVER PARTIES PROPERLY BEFORE IT.

In concluding that this is one of those rare cases in which the federal court should " . . . withhold access from a suitor properly invoking their jurisdiction," the court below held that the "Federal plaintiff must *in the first instance at least* seek relief from the New York Courts." (Emphasis added) Appendix at 2a. The court explains this conditional application of the abstention doctrine in footnotes 5 and 8 of the Opinion:

> [5] In view of the disagreements subsisting between the parties as to LEICL's rights under state law, LEICL will remain free after pursuing its state remedies pursuant to our decision to return to the district court in the event that it is able to present evidence to the effect that its rights may not be adequately asserted by proceedings in the liquidation court.
>
> [8] . . . As stated in note 5, *supra*, however, if LEICL's pursuit of its state remedies should show us to be wrong in our understanding that it has open to it adequate review by the liquidation court, LEICL is free to return to the district court.

Appendix at 8a, 10a.

In stating that Petitioner is free to return to the district court if state remedies prove inadequate, the court takes a path which is unprecedented in abstention jurisprudence. In so doing, the court casts grave doubt upon the very foundation of its opinion. If the three prerequisites for *Burford* abstention are present, it is difficult to forsee any circumstances justifying exercise of federal jurisdiction. The court's approach to this issue suggests that its denial of access to the Petitioner is not founded in the narrow strictures set forth in *Burford* and its progency, but rather is done as a matter of convenience.

Furthermore, if "a scheme in which the state administrative agency and state courts cooperated closely to safeguard the values of uniformity, expertise and due process," (Appendix at 9a) truly existed, the Court would have no concern that the state remedies may prove "inadequate."

Finally, the Court's suggestion that the Petitioner may return if the state proceedings prove "inadequate" violates the most fundamental principles of judicial economy. The Federal Court is clearly capable of resolving the issues posed by the declaratory judgment. To require that Petitioner first test the "adequacy" of the state proceeding exposes all concerned to the potential waste of substantial judicial, administrative and monetary resources.

CONCLUSION

It is apparent from the foregoing that the Federal District Court for the Southern District of New York and the Second Circuit have confused the doctrine of abstention by its improper application in not one but two ways in the instant case. The confusion in this area of the law is further demonstrated by the opposite result reached by the federal court in Ohio. The disregard for judicial economy inherent in the decision below can only serve to put a further strain on our court systems, both federal and state. Accordingly, we respectfully urge this court to grant the Petition for Certiorari, and ultimately to reverse, and direct the

declaratory judgment action in the Federal District Court for the Southern District of New York to proceed to a conclusion.

Respectfully submitted,

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APPENDIX A

Docket No. 86-7658

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

LAW ENFORCEMENT INSURANCE COMPANY, LTD.,
Plaintiff-Appellant,

-against-

JAMES P. CORCORAN,
Defendant-Appellee.

United States Court of Appeals, Filed December 12, 1986
Elaine B. Goldsmith, Clerk
Second Circuit

No. 312 August Term, 1986
(Argued October 24, 1986 Decided December 12, 1986)

Before: KAUFMAN, NEWMAN and PRATT, *Circuit Judges.*

Plaintiff appeals from an order of the United States District Court for the Southern District of New York (Leval, *J.*) entered July 21, 1986 that dismissed declaratory judgment action against the liquidation of an insolvent New York insurance company. The District Court held that it should abstain under *Colorado River Water Conservation District* v. *United States,* 424 U.S. 800 (1976). We affirm on the basis that abstention was proper under *Burford* v. *Sun Oil Co.,* 319 U.S. 315 (1943).

Affirmed.

FRANK H. WRIGHT, New York, New York (Grand & Ostrow, New York, New York, *of counsel), for Plaintiff-Appellant.*

THOMAS M. CAMPBELL, New York, New York (Mathias E. Mone, Marc J. Korpus, Cahill, Gordon & Reindel, New York, New York, *of counsel), for Defendant-Appellee.*

KAUFMAN, *Circuit Judge:*

We are required in this case to revisit a recurring tension in our dual system of justice. The federal courts have a fundamental obligation to adjudicate controversies within their jurisdiction. Yet they also have a duty to abstain from doing so when the case falls within one of the narrow recognized categories of instances in which, because of related state proceedings, action by the federal courts would be thoroughly unproductive.

We have concluded that this is one of those rare cases in which the federal courts should, in deference to a state forum, withhold access from a suitor properly invoking their jurisdiction. Specifically, because continuation of the federal action here would disrupt New York's unified administrative and judicial framework for the administration of the estates of insolvent insurance companies, we hold that the federal plaintiff must, in the first instance at least, seek relief from the New York courts.

FACTS

The relevant facts are straightforward and not in dispute. Law Enforcement Insurance Company, Ltd. ("LEICL") is a Bermuda insurance company that was established in 1977 to provide coverage to law enforcement personnel against liabilities arising from civil rights actions.

In December of 1983, LEICL entered into an agreement with Ideal Mutual Insurance Company ("Ideal"), a New York company. The parties agree that this agreement required Ideal to assume the obligation to provide reinsurance on various LEICL policies. In addition, LEICL claims that the agreement required Ideal to assume LEICL's direct insurance obligation on the policies that had been issued during the year 1977.

In late December of 1983, the Superintendent of Insurance of the State of York ("Superintendent") commenced a proceeding in the Supreme Court, New York County, pursuant to N.Y. Ins. L. § 7402 alleging that Ideal was insolvent and asking to be

named as rehabilitator. An order to this effect was entered by that court on December 26, 1984.

In January of 1985, having concluded that further attempts to rehabilitate Ideal would be futile, the Superintendent sought from the same court an order pursuant to N.Y. Ins. L. § 7417 terminating the rehabilitation proceeding and vesting the business of Ideal in himself for the purpose of liquidating it. On February 7, 1985, the court entered the requested order, which, pursuant to N.Y. Ins. L. § 7419, included a provision enjoining all persons with claims against Ideal "from bringing or further prosecuting any action at law, suit in equity, special or other proceeding against the said corporation or its estate, or the Superintendent and his successors in office, as Liquidator thereof."

LEICL informed the Superintendent of its view that Ideal was obligated under the 1983 agreement to defend and pay claims on the 1977 policies, and received in response a letter rejecting its position.

On February 7, 1986, LEICL filed an action against the Superintendent in the United States District Court for the Southern District of New York. Premising jurisdiction upon diversity of citizenship, the action sought a declaration that Ideal was obligated as a direct insurer on the 1977 policies.

The Superintendent responded to the complaint by moving for an order dismissing the action in deference to the state liquidation proceedings. After full briefing and oral argument, the district court granted the motion. In an opinion reported at 640 F. Supp. 271 (S.D.N.Y. 1986), it held that, under the doctrine of *Colorado River Water Conservation District* v. *United States*, 424 U.S. 800 (1976), it should abstain from exercising its jurisdiction. LEICL appeals.

DISCUSSION

The Supreme Court of the United States has identified four categories of cases in which federal courts should abstain in deference to state courts, two of which are relevant here.[1] While usefully separated for purposes of analysis, these categories are not watertight, and in considering the factors applicable to each category, the federal courts are not to apply "a mechanical checklist," but rather are to conduct "a careful balancing of the important factors as they apply in a given case, with the balance heavily weighted in favor of the exercise of jurisdiction." *Moses H. Cone Memorial Hospital* v. *Mercury Construction Corp.*, 460 U.S. 1, 16 (1983). Because these factors are "to be applied in a pragmatic, flexible manner with a view to the realities of the case at hand," *id.*, at 21, the district court is granted some latitude in its decisionmaking; our review applies an abuse of discretion standard. *Bethlehem Contracting Co.* v. *Lehrer/McGovern, Inc.*, 800 F.2d 325, 327 (2d Cir. 1986).[2]

With these principles in mind, we consider the application to this case of two categories of abstention. Since the district court confined its consideration to the possible applicability of *Colorado River*, *supra*, we begin our analysis at that point.[3]

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[1] This case does not involve abstention to permit state courts to interpret a state statute in a way that might avoid a federal constitutional question, *see Railroad Commission of Texas* v. *Pullman Co.*, 312 U.S. 496 (1941) or abstention from interference in ongoing state criminal or quasi-criminal proceedings, *see Younger* v. *Harris*, 401 U.S. 37 (1971); *see also Trainor* v. *Hernandez*, 431 U.S. 434 (1977); *Juidice* v. *Vail*, 430 U.S. 327 (1977); *Huffman* v. *Pursue, Ltd.*, 420 U.S. 592 (1975).

[2] This case, then recently decided, was called to our attention on oral argument. In the interests of all concerned, we urge counsel who discover previously uncited authority to avail themselves of the mechanism of Fed. R. App. P. 28(j) to call it to the attention of both ourselves and opposing counsel in writing.

[3] We note, however, that since *Colorado River* abstention applies, if at all, only in cases where traditional forms of abstention do not, *Moses H. Cone*, *supra*, 460 U.S. at 14-15; *Colorado River*, *supra*, 424 U.S. at 817, district courts should ordinarily consider the traditional abstention doctrines first, thereby reducing the chances of either unnecessary or incomplete legal discussions.

I. *Colorado River* Abstension [sic]

In *Colorado River*, the Supreme Court faced a factual situation in which state court litigation seeking to settle certain water rights threatened to proceed concurrently with a suit on the same subject brought by the United States on its own behalf and that of several Indian tribes against some 1,000 defendants in a distant federal courthouse. Faced with facts that did not fall within any of the narrow recognized grounds for abstention, the Court decided to recognize a new limited class of "exceptional" cases in which "for reasons of wise judicial administration" and conservation of resources, a federal court should defer to concurrent state proceedings, *Colorado River*, *supra*, 424 U.S. at 818.

In *Moses H. Cone*, the Court reaffirmed the doctrine, while emphasizing the rarity of its application by declining to apply it to the facts at hand, adding, as noted, that the federal courts' weighing of cases must be "with the balance heavily weighted in favor of the exercise of jurisdiction," *Moses H. Cone*, *supra*, 460 U.S. at 16.

In light of this "heavy presumption favoring the exercise of jurisdiction," *Bethlehem Contracting*, *supra*, 800 F.2d at 327, we believe that the decision of the district court to dismiss on *Colorado River* grounds was erroneous. This conclusion follows from a considered weighing of the various factors which the precedents counsel are to be evaluated in determining whether the circumstances are "exceptional."

(a) Avoidance of Piecemeal Litigation

The district court viewed as the strongest exceptional circumstance here that opening the doors of the federal courthouse to LEICL would similarly open them to "countless other plaintiffs" nationwide. While this fear was soundly based, it did not of itself provide a basis for *Colorado River* abstention.[4]

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[4] As we discuss in Part II, this concern would have had a good deal of force in an analysis under *Burford* v. *Sun Oil*, 319 U.S. 315 (1943). But the district court expressly disclaimed such an analysis, 640 F. Supp. at 272.

The "danger of piecemeal litigation" was the paramount factor in the Supreme Court's approval of abstention in *Colorado River*, which involved a federal statute, the McCarran Amendment, whose "primary policy" was the avoidance of piecemeal litigation. *Moses H. Cone*, *supra*, 460 U.S. at 19 & 20 n.22. In *Moses H. Cone*, in contrast, the Court agreed that the result of a refusal to abstain would be duplicative litigation, but refused to give this consequence any weight, since it resulted from the demands of the relevant federal law, in that case the federal Arbitration Act. Id. at 20.

Here, the danger of suits nationwide arises solely as a result of the existence of diversity jurisdiction. And while there have been many scholarly and judicial expressions of doubt as to the desirability of its continuation, so long as Congress chooses to have us exercise diversity jurisdiction, we must do so unflaggingly.

LEICL informs us in its brief that it chose a federal forum because of "concern that its status as a foreign corporation and the fact that LEICL was suing the New York Superintendent of Insurance would redound to prejudice LEICL's position in a state court action." Whatever our view of the validity of that fear, Congress has given LEICL — and, by extension, plaintiffs in the same position — the right to act on it, and "we have a duty to respect that right." *Giardina* v. *Fontanta*, 733 F.2d 1047, 1053 (2d. Cir. 1984).

Thus, the factor upon which the district court relied most heavily was not an exceptional circumstance within the meaning of *Colorado River*. It was, rather, an unremarkable result of the application to this case of a considered federal policy. *Cf. Lumbermens Mutual Casualty Co.* v. *Connecticut Bank & Trust Co.*, ____ F.2d ____ (2d Cir. 1986) (nationwide suits against insurance company exceptional circumstance under *Colorado River* where failure to abstain could lead to inconsistent interpretations of same policy).

(b) Control of a Res

In *Colorado River*, the Court noted a line of cases holding that a "court first assuming jurisdiction over property may exercise that jurisdiction to the exclusion of other courts." *Colorado River*, *supra*, 424 U.S. at 818.

However, the mere fact that the federal and state proceedings concern the same subject matter does not make a case exceptional. *Colorado River*, *supra*, 424 U.S. at 816. Rather, this rationale applies only where the exercise by one court of its jurisdiction would tend to impede or embarrass the other court in the exercise of its jurisdiction. *See, e.g., Tolfree* v. *New York Title & Mortgage Co.*, 72 F. 2d 702 (2d Cir. 1934).

Viewing the present case in isolation, that is, without consideration of New York's statutory scheme for the liquidation of insolvent insurance companies (which we discuss in Part II), this concern is not implicated here. LEICL could obtain in federal court the declaration it seeks and then present its claim to the New York liquidation court without any unseemly interference on the part of the federal courts in state court proceedings. Indeed, it is the general rule that there is no need for deference where the proceedings in one court seek no more than a declaration of rights to property being administered by another. *General Baking Co.* v. *Harr*, 300 U.S. 433 (1937); *Commonwealth Trust Co. of Pittsburgh* v. *Bradford*, 297 U.S. 613 (1936); *Dempsey* v. *Pink*, 92 F.2d 572 (2d Cir. 1937), *cert. denied* 303 U.S. 648 (1938); *Slotkin* v. *Brookdale Hospital Center*, 357 F. Supp. 705, 707-08 (S.D.N.Y. 1972).

(c) Other Factors

Various other factors canvassed by the Supreme Court are of relatively minor significance here. None of them, individually or in combination, provides "the clearest of justification," which alone will warrant a dismissal. *Colorado River*, *supra*, 424 U.S. at 819.

In *Colorado River*, the Supreme Court gave weight to the inconvenience of concurrent state and federal proceedings in light

of the 300-mile distance between the state and federal courthouses. In this case, the two courthouses are adjacent to each other.

Nor is this a case where any weight may be put on the order in which the federal and state cases were begun. Again considering LEICL's claim individually, the state forum had not made any substantial progress towards assessing its merits when the federal suit was filed. *See Moses H. Cone, supra*, 460 U.S. at 21.

While state rather than federal law provides the rule of decision in this diversity case, only elementary contract principles, rather than novel or obscure state law issues are involved. *See Bethlehem Contracting, supra*, 800 F.2d at 328. *Cf. Telesco* v. *Telesco Fuel and Masons' Materials, Inc.*, 765 F.2d 356, 363 (2d Cir. 1985).

And, as more fully discussed below, the relief available in the state and federal courts seems to be of approximately equal efficacy.[5]

There is a closer question concerning the weight to be given to the state court injunction. However, particularly considering the undesirability of permitting state court injunctions to control federal courts in the exercise of their jurisdiction, we do not consider this factor as being of nearly sufficient weight to tip the balance. Rather, following *Dempsey, supra*, we read the injunction narrowly, as not precluding the purely declaratory relief sought here.[6] *See Slotkin, supra.*

From what has been said, it should be clear that we are unable to agree with the district court "that this is one of the rare

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[5] In view of the disagreements subsisting between the parties as to LEICL's rights under state law, LEICL will remain free after pursuing its state remedies pursuant to our decision to return to the district court in the event that it is able to present evidence to the effect that its rights may not be adequately asserted by proceedings in the liquidation court.

[6] Although the opinion in *Dempsey* does not mention the fact specifically, the record of that case reveals that the Supreme Court, New York County, had entered an injunction virtually identical to the one here.

cases in which *Colorado River* abstension [sic] is appropriate." 640 F. Supp. at 272. Indeed, if LEICL's claim had come to us in isolation, we should be constrained to reverse. But, as we now discuss, LEICL's claim cannot, and should not, be wrenched from the context in which the state court acted, the context of a unified administrative/judicial proceeding.

II. *Burford* Abstention

Burford, supra, was an attack by an oil company in federal district court on a decision of the Texas Railroad Commission granting a drilling permit to a competitor. The Supreme Court held that the case was one for abstention because: (1) the order under attack was part of a unified regulatory scheme on a complex subject matter of special state interest, a scheme in which the state administrative agency and the state courts cooperated closely to safeguard the values of uniformity, expertise, and due process; (2) the state had expressed its interest in unified decision-making by creating a system on the state level to avoid multiple inconsistent adjudications, a system that would be disrupted by the exercise of jurisdiction by the federal courts; and (3) the issues sought to be adjudicated in federal court were largely ones of state law.

The facts here closely parallel those in *Burford*. New York has set up a comprehensive plan of regulation of insurance companies, with particularly detailed provisions concerning their rehabilitation and liquidation.[7] In doing so, New York has legislated on a matter of special state concern — so declared by the federal McCarran-Ferguson Act, 15 U.S.C. §§ 1011-15.

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[7] These provisions are set forth in Article 74 of the New York Insurance Law. Sections 7408-15 of that Article constitute the New York enactment of the Uniform Insurance Liquidation Act. In summary, the statutory plan calls for the Superintendent to apply when he deems it appropriate to the Supreme Court in the judicial district in which the insolvent insurer is located for an order naming himself as its rehabilitator or liquidator, depending on whether he

(footnote continues)

The New York courts have long been active partners in the state's regulatory plan. *See Motlow* v. *Southern Holding & Securities Corp.*, 95 F.2d 721, 724 (8th Cir.), *cert. denied*, 305 U.S. 609 (1938). Not only have they on a number of occasions reviewed in considerable detail the propriety of liquidators' decisions to grant or disallow claims, *see, e.g., Matter of New York Title & Mortgage Co.*, 277 N.Y. 66, 13 N.E. 2d 41 (1938), *on later appeal*, 257 App. Div. 19, 11 N.Y.S.2d 828 (1st Dept.), *rearg. den.*, 257 A.D. 822, 12 N.Y.S.2d 1021, *app. dismissed*, 281 N.Y. 829, 24 N.E. 2d 491 (1939); *In re Guardian Casualty Co.*, 161 Misc. 859, 293 N.Y.S. 142 (Sup. Ct., N.Y. Co. 1937), they have implemented the state's policy of unified adjudication by requiring all claims and challenges to be centralized in the court supervising the liquidation or rehabilitation.[8] *See, e.g., Knickerbocker Agency, Inc.* v. *Holz*, 4 N.Y. 2d 245, 173 N.Y.S.2d 602, 149 N.E. 2d 885 (1958); *General Accident Fire & Life Assurance Corp.* v. *Hawkins*, 115 A.D. 2d 357, 495 N.Y.S.2d 398 (1st Dept. 1985); *Powell* v. *All City Insurance Company*, 74 A.D.2d 942,

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(footnote continued)

believes that the business should be run as a going concern or should be terminated. In either event, if the order is granted, the Superintendent takes control of the company's assets and conducts its business subject to the supervision of the court. *See* N.Y. Ins. L. § 7428.

[8] Although our holding does not turn on the procedural details of how that court discharges its responsibilities, we are confident that LEICL's objection to the Superintendent's disallowance of its claim could be heard by motion in the liquidation proceeding itself. We were informed at oral argument that a retired New York State judge has been appointed as referee to hear and report to the court on the appropriate disposition of such matters, and this appears to be the common practice. *See generally In re Manhattan Casualty Co.*, 75 Misc.2d 357, 346 N.Y.S.2d 911 (Sup. Ct., N.Y. Co. 1972); *In re National Surety Co.*, 176 Misc. 53, 26 N.Y.S.2d 370 (Sup. Ct. N.Y. Co. 1941). In any event, it seems clear from *Prince Carpentry Inc.* v. *Cosmopolitan Mutual Insurance Company*, 124 Misc. 2d 919, 479 N.Y.S.2d 284 (Sup. Ct. N.Y. Co. 1984), that LEICL could obtain review by commencing in Supreme Court, New York County either a proceeding pursuant to N.Y. C.P.L.R. Art. 78 or a declaratory judgment action. As stated in note 5, *supra*, however, if LEICL's pursuit of its state remedies should show us to be wrong in our understanding that it has open to it adequate review by the liquidation court, LEICL is free to return to the district court.

426 N.Y.S.2d 135 (3d Dept. 1980); *Matter of Allcity Insurance Company*, 66 A.D. 2d 531, 413 N.Y.S.2d 929 (1st Dept.), *app. den.*, 48 N.Y.2d 629, 421 N.Y.S.2d 192, 396 N.E.2d 474 (1979); *Schenck* v. *Coordinated Coverage Corp.*, 50 A.D. 2d 50, 376 N.Y.S.2d 131 (1st Dept. 1975); *In re Bean*, 207 App. Div. 276, 201 N.Y.S. 827 (4th Dept. 1923); *In re National Surety Co.*, *supra*. Indeed, that is the purpose of injunctions such as the one the liquidation court entered here. And while we do not read that injunction as barring this action of its own force, we do give it weight as an expression of state policy.

More significantly, the policy itself is an important one. As the court below recognized, the structure of the New York system serves the state's strong interest in centralizing claims against an insolvent insurer into a single forum where they can be efficiently and consistently disposed of. 640 F. Supp. at 272, *citing Fidelity Mortgage Investors* v. *Camelia Builders*, 550 F.2d 47, 53, 55 (2d Cir. 1976), *cert. denied*, 429 U.S. 1093 (1977); *see Ambiance, Inc.* v. *Commodore General Insurance Co.*, 553 F. Supp 285, 289 (S.D.N.Y. 1982). *Cf. Lumbermens Mutual Casualty Co.* v. *Connecticut Bank & Trust Co.*, *supra* (abstaining so as to permit single inclusive determination concerning insurance coverage).

For all of these reasons, in *Levy* v. *Lewis*, 635 F.2d 960, 963-64 (2d Cir. 1980), we applied *Burford* to abstain from deciding a case virtually identical to this one — a case in which the Superintendent as liquidator had disallowed a creditor's claim, and the creditor had brought a federal action in response.[9] We emphasized New York's "complex administrative and judicial system for regulating and liquidating domestic insurance companies," the expertise of the Superintendent, the necessity of marshalling the claims and assets in one place, and the "express federal policy

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[9] Before the federal case in *Levy* was brought, the Superintendent had moved in the state liquidation court for approval of his disallowance of the claim. As a result, in abstaining we relied also on grounds analogous to those in *Younger*, *supra*. In addition, we relied on *Colorado River*, a reliance which, for the reasons explained in Part I, may not survive *Moses H. Cone*.

of noninterference in insurance matters" embodied in the McCarran-Ferguson Act.[10] All of these considerations are as relevant today as they were when *Levy* was decided, and persuade us that the same result should follow in this case as in that one. *See Mathias* v. *Lennon*, 474 F. Supp. 949, 954-55 (S.D.N.Y. 1979) (abstaining on *Burford* grounds from deciding claims against Superintendent). This is particularly so since, in contrast to *Levy*, the current case presents no issues of federal law.

Because New York provides "a unified method for the formation of policy and determination of cases by the [Superintendent] and by the state courts," *Burford*, *supra*, 319 U.S. at 333-34, a method which would only be impaired by federal court intervention, the district court acted correctly in abstaining.[11]

Affirmed.

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[10] Although not controlling, we note in this regard that by relegating claimants to a single proceeding centered in the state of domicile of the insolvent insurer, we further the state policies of uniformity that have led well over half of the states to join New York in adopting the Uniform Insurance Liquidation Act. *See Emons Industries, Inc.* v. *Liberty Mutual Fire Insurance Company*, 545 F. Supp. 185, 189-91 (S.D.N.Y. 1982); *G.C. Murphy Co.* v. *Reserve Insurance Co.*, 54 N.Y.2d 69, 444 N.Y.S.2d 592, 429 N.E.2d 111 (1981).

[11] In light of our holding, we find it unnecessary to address the Superintendent's other contentions, notably that the order below should be sustained as an exercise of the district court's discretion under the Declaratory Judgment Act, 18 U.S.C. § 2201.

APPENDIX B

United States District Court

SOUTHERN DISTRICT OF NEW YORK

LAW ENFORCEMENT INSURANCE COMPANY, LTD.,
A BERMUDA CORPORATION,

Plaintiff,

-against-

JAMES P. CORCORAN, SUPERINTENDENT OF INSURANCE OF THE STATE OF NEW YORK AS LIQUIDATOR OF IDEAL MUTUAL INSURANCE COMPANY IN LIQUIDATION,

Defendant.

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86 Civ. 1200 (PNL)
OPINION AND ORDER
Dated: July 17, 1986

APPEARANCES:

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PIERRE N. LEVAL, U.S.D.J.

Defendant, the New York State Superintendent of Insurance, liquidator of Ideal Mutual Insurance Company, moves to dismiss. Plaintiff, Law Enforcement Insurance Corporation ("LEICL") brought the action under 28 U.S.C. § 2201 seeking a declaratory judgment that, under its contract with Ideal, Ideal is legally obligated as direct insurer on claims arising out of policies issued by plaintiff to members of the National Sheriff's Association during the period October 1977 through September 1978. Ideal is in liquidation in the New York State courts under the supervision of the Superintendent of Insurance. On February 7, 1985, the New York Supreme Court entered an order of liquidation which included a stay enjoining all claimants from prosecuting their claims against Ideal otherwise than in the liquidation proceeding. On February 10, 1986, plaintiff brought this action alleging diversity of citizenship and seeking declaratory judgment as to its contract rights with Ideal.

The Superintendent contends that the action must be dismissed under two different federal court abstention doctrines. First, he contends that the abstention doctrine of *Burford* v. *Sun Oil Company*, 318 U.S. 315 (1943), requires the federal court to abstain because the regulation of insurance is a specialized, ongoing scheme committed by law primarily to state authorities. In support of this argument, the Superintendent cites the McCarran-Ferguson Act, 15 U.S.C. §§ 1011 et seq., 1982. *See also Levy* v. *Lewis*, 635 F.2d 960 (2d Cir. 1980).

As a second basis for abstention, the Superintendent cites *Colorado River Water Conservation Dist.* v. *United States*, 424 U.S. 800 (1976), which held that in exceptional circumstances, considerations of wise judicial administration, giving regard to conservation of judicial resources and comprehensive disposition of litigation, permit a federal court to decline to exercise its jurisdiction in favor of concurrent state proceedings.

The Superintendent points out, furthermore, that declaratory judgment jurisdiction is discretionary, giving this court a further basis for declining to exercise diversity jurisdiction.

Plaintiff argues that abstention would be inappropriate. It argues that there is no conflict between the adjudications sought in federal and state court, since plaintiff is not seeking a money judgment here but only a declaration of contract rights; any money judgment would be sought in the state liquidation proceeding. Plaintiff argues, therefore, that the proceedings can exist alongside one another without conflict.

In my view, the Superintendent has adequately justified his claim of entitlement to abstention under the *Colorado River* doctrine. A liquidation of an insurance company (or of any other entity) is rendered seriously inefficient if it cannot be conducted in a unified court proceeding. The policy favoring a unified proceeding has always been implicit in the automatic bankruptcy stay under the U.S. Bankruptcy Laws. It is forcefully expressed in *Fidelity Mortg. Inv.* v. *Camelia Bldrs.*, 550 F.2d 47, 53, 55 (2d Cir 1976), which explains the "compelling need" to collect all claims in a unified proceeding to protect the bankrupt (liquidator or trustee) from being harassed and whipsawed by having to defend in countless different jurisdictions against a chaotic assortment of claims.

Presumably plaintiff is not unique in its desire to avoid litigating its claim in the unified proceeding. It can be assumed that here, as in many bankruptcies and liquidations, there are numerous claimants who believe their fortunes would improve if they could choose the forum, rather than be subjected to the unified forum of the liquidation. In short, if this plaintiff may bring its litigation in the court of its choosing, so may countless other plaintiffs. The liquidator would be required to defend countless actions in various jurisdictions in a manner that would be wasteful, inefficient and contrary to the orderly liquidation of the estate.

The problem is aggravated in this case, as plaintiff concedes, since this court is unable to render full relief. If plaintiff prevails in establishing contract rights through declaratory judgment in this court, it will be required, nonetheless, to pursue further stages of the litigation in the context of the state liquidation proceeding.

Resort to this court, therefore, only fragments and multiplies the instances of litigation. Recognizing the force of the Supreme Court's insistence in *Moses H. Cone Memorial Hosp.* v. *Mercury Constr.*, 460 U.S. 29, 103 S.Ct. 927 (1983), that only the most forceful of reasons can justify a federal court's refusal to exercise its jurisdiction, I nonetheless find that this is one of the rare cases in which *Colorado River* abstention is appropriate. I need not reach plaintiff's arguments based on *Burford* and the discretionary exercise of declaratory judgment jurisdiction.

I find for the reasons discussed in *Colorado River* that the New York State Court's stay barring the plaintiff from pursuing this action should be honored and respected by this court and that the plaintiff's action should be dismissed, requiring the plaintiff to pursue this claim within the framework of the unified state liquidation proceeding. Motion granted. The action is dismissed.

Dated: New York, New York
July 17, 1986

SO ORDERED:

Pierre N. Leval

PIERRE N. LEVAL, U.S.D.J.

APPENDIX C

IN THE

United States District Court

FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

MCDONOUGH CAPERTON SHEPHERD GROUP, INC., *Plaintiff.*	CASE NO. C85-3507
v.	Judge John M. Manos
ACADEMY OF MEDICINE, CLEVELAND, et. al., *Defendants.*	

MEMORANDUM OF OPINION

On November 22, 1985, McDonough Caperton Shepherd Group, Inc. ("MCSG"), plaintiff, filed the above-captioned case in interpleader against the defendants — Academy of Medicine, Cleveland ("Academy"); Timothy M. Tuthill, M.D., Ohio Health Choice Plan ("OHCP"); Ideal Mutual Insurance Company ("Ideal"); James P. Corcoran; and Joseph A. LaMonte. MCSG has deposited one million six hundred fifty-two thousand five hundred seventy-five dollars ($1,652,575.00) in the registry of the court. Jurisdiction is contested under 28 U.S.C. §1335.[1] The case is currently before the court on the joint motion of Ideal, Corcoran, and LaMont ("the New York defendants") to dismiss. For the following reasons, their motion is denied.

[1] 28 U.S.C. §1335 provides, in pertinent part:

> (a) The district courts shall have original jurisdiction of any civil action of interpleader . . . filed by any . . . having in . . . or its custody or possession money . . . of the value of $500 or more . . . , if
>
> (1) Two or or more adverse claimants, of diverse citizenship as defined in section 1332 of this title, are claiming or may claim to be entitled to such money . . . ; and if (2) the plaintiff has deposited such money . . . into the registry of the court, there to abide the judgment of the court. . . .

MCSG is a West Virginia corporation which has served as an insurance broker and administrator for Academy and OHCP. Interpleader Claims of Academy and Tuthill, ¶ 5; Complaint, ¶'s 11, 17. Academy is an Ohio professional association; OHCP is a non-profit corporation organized under the laws of Ohio. Complaint, ¶'s 1, 2. Academy and OHCP make available group health insurance plans to their members. *Id*, ¶ 12. MCSG procured and sold these plans from Ideal to the participants in them. *Ibid*. Tuthill is a member of Academy and a participant in its plan. Interpleader Claim, ¶'s 1, 2. Before December 26, 1984, these participants paid MCSG one million six hundred fifty-two thousand five hundred seventy-five dollars ($1,652,575.00) in premiums for the first half of 1985. Complaint, ¶ 17; Interpleader Claim, ¶ 3.

Ideal is an insurance corporation organized under the laws of the state of New York. Complaint, ¶ 5. For New York, Corcoran is the Superintendent of Insurance and LaMont is the Special Deputy Superintendent. *Id*., ¶'s 6, 7. On December 26, 1984, the New York Supreme Court issued an Order of Rehabilitation, which provided in pertinent part:

> ORDERED, that all policy and/or insurance obligations of IDEAL MUTUAL INSURANCE COMPANY written for policyholders outside of the State of New York are cancelled and all obligations thereunder cease and terminate as of 12:00 o'clock midnight Eastern Standard Time, January 26, 1985. . . .

Complaint, ¶'s 15, 18, Exh. B. On February 7, 1985, the court issued an Order of Liquidation, which provided in pertinent part:

> ORDERED AND ADJUDGED, that JAMES P. CORCORAN . . . is hereby appointed Liquidator of IDEAL, and is hereby authorized and directed forthwith to take possession of the property and liquidate the business and affairs of IDEAL. . . .

* * *

> ORDERED AND ADJUDGED, that notice of the making and entering of this order be given by the Superintendent, as Liquidator, . . . demanding that all persons indebted to IDEAL render accounts of their indebtedness and pay any sums due. . . .
>
> * * *
>
> ORDERED AND ADJUDGED, that IDEAL, its officers, directors, trustees, policyholders, agents and employees and all other persons having any property or records belonging to IDEAL, are hereby directed to assign, transfer and deliver to the Superintendent, as Liquidator, all of such property. . . .
>
> * * *
>
> ORDERED AND ADJUDGED, that the officers, directors, trustees, policyholders, agents and employees of IDEAL, and all other persons . . . are permanently enjoined and restrained from bringing or further prosecuting any action at law, suit in equity, special or other proceeding against the said corporation or its estate, or the Superintendent . . . , as Liquidator thereof.

Complaint, ¶ 16, Exh. C.

MCSG and each of the defendants have made or may make claims to the money in the registry of this court. Complaint, ¶'s 19, 20.

II.

The New York defendants have moved for dismissal on two grounds. They contest jurisdiction under section 1335 and alternatively urge abstention of it. Their arguments are not persuasive.

The New York defendants argue that the McCarran-Ferguson Act limits jurisdiction under section 1335.[2] In a similar context, the United States Supreme Court has declared:

> When there are statutes clearly defining the jurisdiction of the courts the force and effect of such provisions should not be disturbed by a mere implication flowing from subsequent legislation. . . . In the absence of some affirmative showing of an intention to repeal, the only permissible justification for a repeal by implication is when the earlier and later statutes are irreconcilable. . . .

Colorado River Water Conservation District v. United States, 424 U.S. 800, 809, 96 S.Ct. 1236, 1242 (1976) (*quoting Rosecrans v. United States*, 165 U.S. 257, 262, 17 S.Ct. 302, 304 (1897) and *Morton v. Mancari*, 417 U.S. 535, 550, 94 S.Ct. 2474, 2482 (1974)(citations omitted). Section 1335 is the earlier statute.

The language of the McCarran-Ferguson Act does not show Congressional intent to limit jurisdiction under Section 1335 but rather to protect the jurisdiction of the state courts. There is no irreconcilability in concurrent jurisdiction of the federal and state courts, *Colorado River*, 424 U.S. at 803-04, 810, 96 S.Ct. at 1239, 1242. The McCarran-Ferguson Act does not limit jurisdiction under Section 1335.[3]

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[2] The McCarran-Ferguson Act provides in pertinent part:

> The business of insurance . . . shall be subject to the laws of the several states which relate to the regulation or taxation of such business.
>
> No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any state for the purpose of regulating the business of insurance. . . .

[3] None of the cases which the New York defendants cite stand for the proposition that the McCarran-Ferguson Act limits the jurisdiction of the federal district courts: *Levy* v. *Lewis*, 35 F.2d 960,966 (2nd Cir. 1980) ("the principle involved is more accurately described as a prudential doctrine in which a second court with concurrent jurisdiction will exercise its discretion to defer to another court . . . "); *Matlow* v. *Southern Holding & Securities Corp.*, 95

(footnote continues)

The New York defendants urge abstention from exercising jurisdiction pursuant to doctrines developed in the *Burford* and *Colorado River* cases and principles of comity developed under the Full Faith and Credit Clause.

In *Burford* and *Colorado River*, federal action directly interfered with state action. In *Burford*, the United States Supreme Court stated: "a sound respect for the independence of state action requires the federal equity court to stay its hand." 319 U.S. at 334, 63 S.Ct. at 1107. In *Colorado River*, the court held that

> considerations of "[w]ise judicial administration, giving regard to conservation of judicial resources and comprehensive disposition of litigation" [justified dismissal].

424 U.S. at 818, 96 S.Ct. at 1246 (*quoting Kerotest Mfg. Co.* v. *C-O-Two Fire Equipment Co.*, 342 U.S. 180, 183, 72 S.Ct. 219, 221 (1952)) (citations omitted). In both cases, the Court upheld abstention by the district court.

This case, the *Burford* and *Colorado River* cases, and the other cases which the New York defendants cite are distinct. *See*

(footnote continued)

F.2d 721, 726 (8th Cir.), *cert. denied*, 305 U.S. 609, ___ S.C.T. ___ (1938) ("the title to the cause of action which the plaintiff attempts to assert was vested . . . in the superintendent of insurance . . . , and . . . the allegations of the plaintiff's bill were insufficient to entitle the plaintiff to maintain this suit . . . "); *Aims Enterprises* v. *Muir*, 609 F.Supp. 257, 261 (M.D. Pa. 1985) ("The reasoning of *Levy* applies directly to the case at bar . . . [and] therefore indicate[s] abstention is appropriate here."); *Metropolitan Life Insurance Co.* v. *Board of Directors*, 572 F. Supp. 460, 473 (W.D. Wis. 1983) ("I conclude that [*Burford* v. *Sun Oil Co.*, 319 U.S. 315, 63 S.Ct. 1088 (1943)] requires abstention in this case"); *Matter of All-Star Insurance Corp.*, 484 F.Supp. 623, 625 (E.D. Wis. 1980) ("Abstention is appropriate in this case . . . "); *Mathias* v. *Lennon*, 474 F.Supp. 949, 954 ("this court should abstain from interfering in the state rehabilitation proceedings."); *Superintendent of Insurance* v. *Bankers Life & Casualty Co.*, 401 F.Supp. 640 (S.D. N.Y.) *aff'd without opinion*, 526 F.2d 586 (2d Cir. 1975) ("The proper procedure was to apply to the Supreme Court of the United States for *certiorari* from the final state court determinations . . . Accordingly, this court lacks jurisdiction to review these state court determinations . . .).

ftnt. 3 *supra*. Here, the issues are not those before the New York court. In *Burford*, the plaintiffs sought to enjoin an order of a state agency. 319 U.S. at 317, 63 S.Ct. at 1099. In *Colorado River*, the federal district court and a state court had the same questions of law and fact before them. 424 U.S. at 807, 96 S.Ct. at 1240. Similarly, direct intervention in state proceedings was the basis of each of the other cases which the New York defendants cite. *See* Brief of Academy and Tuthill in Opposition to Motion to Dismiss, pp. 11-13.

This cases involves money abiding in the registry of the court; the action in the New York court involves the property of a liquidated insurance company. While both are *in rem* actions, the *res* of each is distinct. This case does not involve the direct interference in ongoing state proceeding that gave rise to the *Burford* doctrine; and that doctrine does not apply.

This case involves issues distinct from those before the New York court. Here, the issue is what are the respective rights of these parties to the money in the court's registry. To the extent the claims of the New York defendants, if any, are meritorious, some, none, or all of the money will be adjudicated part of the *res*, before the New York court. There, the issue of what are the priorities of Ideal's creditors will be resolved. Thus, there will be one resolution of each issue and the doctrine of *Colorado River* does not apply.

Principles of comity developed under the Full Faith and Credit Clause do not control this case because the actions of MCSG do not violate the injunction of the New York court.

Some parts of the injunction in the Order of Liquidation arguably could encompass the subject-matter of this suit:

> ORDERED AND ADJUDGED, that notice of the making and entering of this order be given by the Superintendent, as Liquidator, . . . demanding that all persons indebted to IDEAL render accounts of their indebtedness and pay any sums due. . . .

Complaint, ¶ 16, Exh. C. Until the issue of whether MCSG, Academy, or OHCP are indebted to the New York defendants is decided, they cannot know whether this order applies to them. Thus, these terms of the injunction are not grounds on which abstention would be appropriate.

Similarly, the Order of Liquidation commands

> ORDERED AND ADJUDGED, that IDEAL, its officers, directors, trustees, policyholders, agents and employees and all other persons having any property or records belonging to IDEAL, are hereby directed to assign, transfer and deliver to the Superintendent, as Liquidator, all of such property. . . .

This is not binding upon MCSG until this or another court determines or MCSG admits that it has property of Ideal.

Lastly, the Order of Liquidation provides:

> ORDERED AND ADJUDGED, that the . . . agents . . . of IDEAL, and all other persons . . . are permanently enjoined and restrained from bringing or further prosecuting any action at law, suit in equity, special or other proceeding against the said corporation or its estate, or the Superintendent . . . , as Liquidator thereof.

There is no showing that MCSG was the agent of Ideal. Moreover, MCSG has not brought this action against the estate of Ideal; rather, it has demanded that Corcoran prosecute any action that Ideal may have had against the money in the registry of the court or forfeit that action. Thus, this last order does not apply.

Because this action is not a claim to the property which is before the New York court, jurisdiction is proper and abstention inappropriate.

Accordingly, for the reasons stated above, the motion of the New York defendants to dismiss is denied.

IT IS SO ORDERED.

John M. Manos

JOHN M. MANOS
UNITED STATES DISTRICT JUDGE

IN THE

United States District Court

FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

MCDONOUGH CAPERTON SHEPHERD GROUP, INC., *Plaintiff,* v. ACADEMY OF MEDICINE, CLEVELAND, et. al., *Defendants.*	CASE NO. C85-3507 Judge John M. Manos

ORDER

Pursuant to the Memorandum of Opinion issued in the above-captioned case this date, the Joint Motion to Dismiss of the Ideal Mutual Insurance Company, James P. Corcoran, and Joseph A. LaMonte is denied.

IT IS SO ORDERED.

John M. Manos

JOHN M. MANOS
UNITED STATES DISTRICT JUDGE